SUM PHOON MUN

v.

MANN FOONG REALTY SDN BHD & ANOR

HIGH COURT MALAYA, IPOH
ABDUL HAMID EMBONG J
[CIVIL SUIT NO: 22-126-96]
9 FEBRUARY 1998

CIVIL PROCEDURE: *Writ of summons - Striking out - Evidence to be examined - Rules of the High Court 1980, O. 18 r. 19(1)*

The instant appeal was from the decision of the senior assistant registrar dismissing the second defendant's application to strike out the plaintiff's writ of summons and statement of claim pursuant to O. 18 r. 19(1) of the Rules of the High Court 1980 ('RHC').

The plaintiff had sought specific performance for his purchase of two shoplots developed by the first defendant on the second defendant's land and for a declaration that he be named the registered proprietor of the two shoplots or alternatively for damages.

The central issue concerned the validity and effect of the power of attorney granted by the second defendant to the first defendant to develop the land. The question to be determined was whether the action by the plaintiff was bound to fail.

Held:

[1] The validity and authenticity of the power of attorney poses a question of law to be determined by the trial judge. For the moment it should be accepted by the instant court, without the necessity of a detailed enquiry into its validity by virtue of s. 3(2) of the Powers of Attorney Act 1949.

[2] In deciding on an application under O. 18 r. 19 of the RHC, the evidence is to be examined in determining whether the action is bound to fail.

[2a] The plaintiff's action was not one that was obviously unsustainable. Thus, it should not be struck off.

[Appeal dismissed with costs.]

Cases referred to:

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corp Bhd [1993] 4 CLJ 7 ***(not foll)***

Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd [1996] 4 CLJ 52 ***(cit)***

Raja Zainal Abidin Raja Hj Tachik & Ors v. British American Life & General Insurance Bhd [1993] 3 CLJ 606 ***(foll)***

Tractors Malaysia Bhd v. Tio Chee Hing [1975] 2 MLJ ***(cit)***

Legislation referred to:

Housing Developers (Control and Licensing) Regulations 1989, reg. 11(1)
Powers of Attorney Act 1949, s. 3(2)
Rules of the High Court 1980, O. 18 r. 19(1)

For the plaintiff - Hira Singh; M/s Asbir, Hira Singh & Co
For the defendants - David Hoh; M/s Lim & Hoh

Reported by Hjh Siti Faridah Abd Jabbar

JUDGMENT

Abdul Hamid Embong J:

This is an appeal by the second defendant (D2) against the decision of the Senior Assistant Registrar dismissing her application (encl. 4) to strike out the plaintiff's writ of summons and statement of claim pursuant to O. 18 r. 19 of the Rules of the High Court 1980 (RHC).

Although originally grounded on all the four limbs of r. 19(1), and a further ground under the inherent jurisdiction of the court, learned counsel for D2, in the course of submission abandoned the 'no reasonable cause of action' ground and urged this court to put the evidence in the affidavits to a 'fine-toothed comb test' in assessing whether D2 has a basis for this application. In support, he cited the Privy Council case of *Tractors Malaysia Bhd v. Tio Chee Hing* [1975] 2 MLJ as followed by the Supreme Court in *Raja Zainal Abidin bin Raja Haji Tachik & Ors v. British American Life & General Insurance Bhd* [1993] 3 MLJ 16.

Learned counsel for the plaintiff, on this preliminary point, referred to the Supreme Court case of *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corp Bhd* [1993] 3 MLJ 36, where it was held that in our O. 18 r. 19 application, the court should not embark on a minute examination of documents. However, I am inclined to follow the approach taken by the Supreme Court in *Raja Zainal Abidin*, a case decided after the decision of *Bandar Builder*, where the Supreme Court was minded to follow the advice of the Privy Council in holding that the Federal Court in *Tractors Malaysia Bhd* was in error in not examining the evidence and deciding whether the action bound to fail. This is what the Supreme Court said in *Raja Zainal Abidin* –

> In conclusion, with great respect, the learned judge could have avoided the pitfall as described by the Privy Council in Tractors. The lower court should have also scrutinized the evidence in order to decide whether the action was bound to fail. If so, it would have been found otiose to send the case back to its starting point to start its long and expensive course albeit such a conclusion was reached on an application filed under O. 18 r. 19.
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> We must emphasize that for any court to reach such a similar decision on an application under O. 18 r. 19, there must, in all probability, have been an absence of conflict of material evidence or of conflict of affidavits on material points so that seemingly triable issues, seemingly difficult ones, could be readily decided in such a way as to lead to the conclusion that the action was bound to fail.

The cause of action arose under two tripartite agreements for sale (see encl. 18 – exbt. SPM-2) between the plaintiff and the first defendant (D1), as donee of a power of attorney granted by D2 to D1's directors to develop D2's land, both entered into on 19 October 1995. The plaintiff in seeking for specific performance on the purchases of two shoplots developed by D1 on D2's land and for a declaration that he be named the registered proprietor to those two shoplots or alternatively for damages. Learned counsel for D2 submitted that the validity of the Power of Attorney (PA) itself is questionable. The PA was executed by D2 in favour of D1's directors as donees, on 9 April 1979, pursuant to a Joint Venture (JVA) between D1 and D2, also entered into on the same date ie, 9 April 1979 and registered as PA No. 473/79.

It was not in dispute that the PA was revoked on 2 September 1996 (see exbt. 'SPM-3' in encl. 18). It was therefore, the plaintiff's case that when the tripartite agreements for sale of 19 October 1995 was signed, D1 was acting pursuant to the power it derived under the P.A. which was then still subsisting and that D2 was fully aware of the existence and effect of that PA.

D2's counsel however argued that the revocation of 2 September 1996 was but a mere formality to prevent the developers, ie, D1, as donees of the PA, from abusing its powers derived thereunder. Learned counsel referred to cl. 26 of PA as proof of this automatic revocation which states:

> 26: The owner shall on the execution of this Agreement execute a Power of Attorney in favour of the Developers or their duly authorised agent in terms of a draft Power of Attorney annexed hereto such Power of Attorney to be revoked on completion of the erection of shophouses on the said land.

D2's counsel submitted that the plaintiff as purchaser under the tripartite agreements had in fact paid the whole purchase price of RM340,000 for the two shoplots he had purchased. There was no stage progress payments to lawyers as stakeholders as is commonly practised. This was because the shoplots had by then been completed. D1 was therefore obliged to hand over the documents of title to the plaintiff as agreed to under cl. 10(1) of the tripartite agreements (SPM-2). And since the shoplots were already completely erected the PA was deemed to have I been revoked under cl. 26 cited above. In referring to cl. 19(1) of the tripartite agreements, learned counsel for D2, also contended that the titles to the shoplots purchased by the plaintiff were readily available to D1 even before the signing of those agreements. However, with respect, the court could find no such evidence available except for the assertion from the Bar, which must be rejected.

Next, it was submitted that the recitals to the PA itself refer to an agreement of an even date (ie, 9 April 1979 being the date of the execution of the PA). Thus the PA could not have been executed to extend to D2's obligations under the tripartite agreements, which were entered into on 19 October 1995.

It seems to me that the central issue revolves around the validity and effect of the PA granted by D2. It is clear that at the time of execution of the tripartite agreements for the sale and purchase of the shoplots to the plaintiff, the PA was very much alive. The revocation of the PA was only effected on 2 September 1996 and entered with the serial number No. 188/96 at the High Court, Ipoh (see at SPM-3 – encl. 18). The PA gave D1 as developers of D2's land various powers to deal with the land and matters relating to its development which, *inter alia*, included a power to sign the sale and purchase agreements. It was contended on the plaintiff's behalf that the court need not look behind the PA and question its validity. It was also submitted that the plaintiff was not a party to or had notice of the JVA entered into between the defendants, D1 and D2. The presumption that the plaintiff would have had notice of the JVA is furthermore a question of fact, which can only be determined by the trial judge. I agree. It is also my view that the validity and authenticity of the PA, poses a question of law to be determined by the trial judge. For the moment it should be accepted by this court, without the necessity of a detailed enquiry into its validity by virtue of s. 3(2) of the Powers of Attorney Act 1949 which states –

> (2) Notwithstanding anything to the contrary contained in any written law in force at the commencement of this Act, an instrument purporting to create a power of attorney duly executed and authenticated in accordance with this section shall be deemed to be properly and validly executed an attested for all or any of the purposes for which a power of attorney may be used under any such written law.

In another suit involving the same defendants as in this case (GS. 22-155-1996 – *Ho Weng Kong v. Mann Foong* and *Dial Kaur a/p Tara Singh*), where I had also dismissed D2's application to strike out the plaintiff's pleading, I had the opportunity to consider the question of the validity of the same PA and had concluded that it raises a *bona fide* issue to be tried. That decision is now pending appeal, but I wish to quote a passage from my judgment in that case and to add here that, my view remains unchanged

> ... Tuntutan plaintif terhadap D2, selaku pemilik berdaftar tanah tersebut, berlandaskan surat kuasa wakil yang dikatakan telah diberi kepada D1. Persoalan ini sahaja, pada pendapat saya telah menimbulkan satu isu *bona fide* yang perlu dibicarakan. Pertikaian terhadap kewujudan atau terma-terma surat kuasa wakil itu tidak boleh dibicarakan pada peringkat ini. Dalam pertimbangan Mahkamah terhadap alasan ini, tugas Mahkamah hanya untuk menentukan samada ini merupakan satu kes yang jelas dan nyata untuk menggunakan prosidur terus. Jika Mahkamah berpuashati setelah pertimbangan sewajarnya dibuat ke atas pliding plaintif, bahawa ini merupakan satu tuntutan yang jelas tidak dapat dipertahankan (obviously unsustainable), maka barulah Mahkamah boleh bertindak untuk membatalkan pliding plaintif. (Lihat *Bandar Builder Sdn Bhd & Ors v. Umted Malayan Banking Corp Bhd* [1993] 3 MLJ 36). Dalam kes tersebut Mahkamah Agong juga berkata bahawa selagi pliding itu mendedahkan sesuatu kausa tindakan atau menimbulkan persoalan yang patut diputuskan oleh hakim, hakikat bahawa kes itu adalah lemah dan tidak mungkin berjaya pada perbicaraan tidak menjadi alasan supaya pliding itu dibatalkan.
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> Melihat kepada pernyataan tuntutan plaintif, saya tanpa ragu bahawa persoalan pemberian kuasa oleh D2 menimbulkan satu perkara undang-undang yang serius yang memerlukan perbincangan melalui perbicaraan penuh. Tuntutan plaintif ini pula disokong oleh pembelaan D1 sendiri apabila melalui pembelaannya di perenggan kedua dia menyatakan, tanpa syarat, bahawa dia bertindak sebagai wakil kuasa D2.
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> Seterusnya dalam penilaian secara kritikal yang dibuat terhadap afidavit, Mahkamah telah dirujuk kepada SPA (Esbt. HWK-l dan HWK-2 dan LSD-l) yang merujuk kepada JVA bertarikh 11.7.1980. Di dalam JVA tersebut (Esbt. LSD-7) dihujah oleh peguam bahawa plaintif telah gagal menunjukkan surat kuasa wakil yang dikatakan olehnya memberi kuasa kepada D1 menandatangani JVA tersebut sebagai Wakil D2. Tambah lagi, hujah peguam, jika pun benar bahawa D1 bertindak selaku wakil D2, ini berlandaskan kepada surat kuasa wakil yang terdahulu, bertarikh 9.4.1979, yang telah dibatalkan. Oleh itu plaintif telah gagal menunjukkan kaitan D2 kepada SPA tersebut. Peguam plaintif pula berhujah bahawa tuntutan plaintif terhadap D2 berlandaskan SPA (HWK-l, HWK-2 dan LSD-l) yang ditandatangani antara D1 dan plaintif. Di dalam preamble SPA tersebut, jelas dinyatakan bahawa D2 adalah pemilik berdaftar tanah tersebut. SPA juga telah merujuk kepada JVA yang dibuat antara D1 dan D2, dan D2 tidak pernah menafikan kenyataan ini. Jelas daripada JVA tersebut,

hujah peguam plaintif, bahawa D2 berhasrat untuk tanah tersebut dibangunkan dan dijual oleh D1. Berkenaan dengan surat kuasa wakil, ia telah didaftarkan di Mahkamah Tinggi pada 24.4.79 dan hanya dibatalkan pada 2.9.96, mengikut endorsement yang terdapat di muka belakang surat kuasa wakil itu sendiri. Oleh itu perwakilan oleh D2 berkuatkuasa semasa SPA dibuat antara plaintif dan D1.

Saya telah melihat dan mempertimbangkan afidavit bersama dokumen-dokumen relevan dalam kes ini dan berpendapat bahawa isu pokok ialah soal kewujudan surat kuasa wakil pada masa yang material. Pertikaian ini yang merangkumi hak pihak-pihak hendaklah ditentukan melalui satu perbicaraan penuh. Seimbas pandang, surat kuasa wakil yang dipertikaikan masih berkuatkuasa pada masa SPA ditandatangani oleh D1. D1 sendiri dan pembelaannya mengesahkan perkara ini. Saya tidak nampak, atas pertimbangan isu ini sahaja, bahawa tuntutan plaintif boleh dikatakan sebagai remeh dan menyusahkan, untuk membenarkan Mahkamah ini menggunakan budibicaranya membatalkan pliding plaintif di peringkat prosidur terus di bawah A. 18 k. 19. Setelah melihat kepada latarbelakang kes ini secara keseluruhan, Mahkamah berpuashati bahawa plaintif telah berjaya mendedahkan satu kausa tindakan *prima facie* terhadap D2, atas alasan bahawa D2 berhubungkait dengan D1 melalui surat kuasa wakil yang diberi olehnya kepada D1 dan oleh itu terikat bersama terhadap apa-apa liabiliti di bawah SPA. Isu yang dibangkitkan oleh plaintif ini bukan sahaja menjadi isu tetapi satu isu yang, pada pendapat saya, *prima facie* perlu dibicarakan.

The only other issue raised in the submission of learned counsel for D2 which I need to touch on is the status of D1 as licensed developer. It was contended that the tripartite agreements for sale was purportedly made pursuant to reg. 11(1) of the Housing Developers (Control and Licensing) Regulations 1989, as are depicted in the headings of those agreements. It presupposes that D1 is a housing developer *viz* a developer for residential properties not commercial ones, as was the case here. As such the whole transaction, including the legality of the agreements too, is questionable. Learned counsel cited *Keng Soon Finance bhd v. MK Retnam Holdings Sdn Bhd* [1996] 2 MLJ 431 in support of his argument. The short answer to this is, as was submitted by plaintiff's counsel, that he who alleges must prove. There is insufficient evidence for the court at this juncture to make any presupposition. I agree with the plaintiff's stand that the head recital of the tripartite agreements itself makes a statement that the D1 is "duly licensed under the Housing Developers (Control and Licensing) Act 1966". In my view, the plaintiff is under no legal duty to investing further into the status of D1 as a licensed housing developer. Furthermore, the question of the illegal status of D1 as a licensed developer had not been deposed in the affidavits of D2 supporting this application. Learned counsel for D2 submitted that the question of illegality need not be pleaded. Even so, it is my view that the issue involves a question of facts and law and needed determination by the trial court.

Learned counsel for D2 was absolutely right when he submitted that the question for this court to answer is whether the action was bound to fail. It is my finding that, after scrutinising the affidavits and contemporaneous documents and putting them to the fine-toothed comb test, this action is not one that is obviously unsustainable to subject it to be struck off.

Appeal dismissed with costs.

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